

Issue: Group III Written Notice with demotion (excessive and inappropriate force during restraint of a ward); Hearing Date: 03/03/03; Decision Issued: 03/04/03; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 5653;  
**Judicial Review: Appealed to the Circuit Court in Powhatan County on 03/12/03; Outcome: HO's decision found not to be contradictory to law. Decision affirmed (07/22/03).**



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5653

Hearing Date: March 3, 2003  
Decision Issued: March 4, 2003

**APPEARANCES**

Grievant  
Attorney for Grievant  
Representative for Agency  
Five witnesses for Agency

**ISSUE**

Was the grievant's conduct subject to disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice issued for using excessive and inappropriate force during restraint of a ward.<sup>1</sup> As part of the disciplinary action, grievant was demoted from sergeant to juvenile corrections officer senior. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Department of Juvenile Justice (Hereinafter referred to as "agency") has employed grievant for six years. He had been a sergeant for two years.

The facility at which grievant is employed has promulgated an institutional operating procedure on the use of physical force. The policy provides that a reasonable use of physical force is authorized but that such force shall be limited to the minimum amount necessary to bring the ward under control.<sup>3</sup> Grievant has received departmental training on multiple occasions regarding the correct application of physical restraint techniques. Punching a ward in the head is not an approved physical restraint technique.

At about 5:45 p.m. on November 13, 2002, a ward returned to his housing unit from the dining hall and became angry because the unit's outside recreation had been cancelled. He began using profane language toward a corrections officer. That officer requested that the grievant come to the housing unit to deal with the situation. Grievant arrived and attempted to persuade the ward to enter his room. Grievant was in front of the ward, with the second officer at the ward's side, while a third officer stood behind the ward. Grievant attempted to restrain the ward but the ward resisted. During the struggle, the ward pushed forward, knocking grievant to the floor on his backside. The grievant got to his feet and struck the ward in the face with a closed-fist uppercut one or more times. The ward struggled with the officers from the time he pushed grievant to the floor. The officers attempted to get the ward down to the floor but he continued struggling and the officers pushed him into the bathroom. They finally wrestled him to the floor and he continued to resist until he was handcuffed. As a result of the physical encounter, the ward sustained multiple contusions, bruises and scratches to his head, neck, upper arms, lower back, and torso.<sup>4</sup>

A female counselor was in the area and observed grievant strike the ward in the face and put his hands around the ward's throat.<sup>5</sup> She reported the incident and two assistant superintendents came to the unit to investigate. Photographs were taken within two hours of the incident. An investigator from the Inspector General's office was assigned to the case on November 14, 2002.

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<sup>1</sup> Exhibit 6. Written Notice, issued December 6, 2002.

<sup>2</sup> Exhibit 6. Grievance Form A, filed December 23, 2002.

<sup>3</sup> Exhibit 7. Section 218-4.2(4), Institution Operating Procedure IOP-218, *Use of Physical Force*, September 30, 2002.

<sup>4</sup> Exhibit 3. Photographs of ward taken within two hours of the physical restraint.

<sup>5</sup> Exhibit 1. Incident report completed by counselor, November 13, 2002.

He interviewed more than 30 people including the corrections officers, the counselor, the grievant, the ward and 26 wards. Of the 24 wards present in the unit during the physical restraint, several either did not see the incident or were reluctant to be interviewed. However, 16 wards provided statements that they had witnessed grievant punch the ward in the face with a closed fist.<sup>6</sup> Their statements were generally consistent with each other.

The grievant is six feet, five inches tall and weighs 285 pounds. The ward is over 18 years of age, is five feet, ten inches tall and weighs 200 pounds. One of the other two officers is five feet, eleven inches tall and weighs 225 pounds; the second is five feet nine inches tall and weighs 160 pounds. The wards at this juvenile facility are the most aggressive in the state correctional system. The ward involved in this incident was one of the more aggressive at the facility but was not housed with the worst offenders. He was taking medication to control his aggression but sometimes failed to take his daily dosage.

#### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the

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<sup>6</sup> Exhibit 4. Investigative Report, November 21, 2002.

circumstances. In all other actions, the employee must present his evidence first and must prove her claim by a preponderance of the evidence.<sup>7</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.<sup>8</sup> One example of a Group III offense is fighting or other acts of physical violence. The Standards also state:

The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgment of agency heads, undermines the effectiveness of the agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.<sup>9</sup>

The agency has demonstrated, by a preponderance of evidence, that during the course of a physical restraint, grievant hit a ward in the face with a closed-fist uppercut on one or more occasions. A female counselor witnessed the incident as did at least 16 other wards present in the area.

Grievant did not offer any documents, witnesses or testimony in his defense. Instead, he stands by his statement to the investigator that he did not strike the ward. He also argues that only one adult (other than those directly involved in the restraint) witnessed the incident, and that her testimony was hesitant. The counselor did hesitate about certain aspects of her testimony, however, she was not hesitant about stating that grievant struck the ward in the face with a closed fist. Moreover, the grievant has offered no reason to question the credibility or motivation of the counselor. There is no evidence that the counselor has any reason to fabricate what she observed.

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<sup>7</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>8</sup> Exhibit 8. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>9</sup> Exhibit 8. Section V.A., *Ibid*.

Grievant also argues that the testimony of the 16 wards should be given little or no evidentiary weight. He suggests that wards of correctional facilities will all testify alike and infers that their testimony might not be truthful. The hearing officer acknowledges that the testimony of incarcerated persons should always be subjected to close scrutiny. However, a trained investigator interviewed the wards separately and found no significant inconsistencies in their statements. His investigation was conducted within a few days of the incident, thereby minimizing the risk that 16 wards could have colluded to fabricate the same story. Grievant also infers that because these wards have not reached the age of 21, their testimony is entitled to less evidentiary weight. However, most of these wards are between the ages of 16 and 20. Therefore, their ability to provide accurate witness statements is no less than that of someone who has reached the age of majority.

Grievant also argues that the allegations of past inappropriate behavior by grievant should not be considered in making this decision. The hearing officer agrees. Although charges had previously been made against grievant, none of the incidents investigated by the Inspector General had resulted in any findings against grievant. There is no evidence that grievant has been disciplined for any prior inappropriate behavior. Therefore, the hearing officer has not given any evidentiary weight to the prior, unfounded complaints against grievant.

### Mitigation

The Standards of Conduct provide for the consideration of mitigating circumstances in the implementation of disciplinary actions. The Standards of Conduct states, in pertinent part:

While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b. an employee's long service or otherwise satisfactory work performance.<sup>10</sup>

The Inspector General's office felt that grievant's actions warranted the termination of his employment. However, the facility superintendent characterized grievant's performance as exceptional and determined that grievant should be retained as a corrections officer. He felt that grievant's reaction to being knocked to the floor by a ward was not unsurprising under the circumstances. He believes that grievant understands that he made a very serious mistake - one that cannot ever be repeated - but that grievant can still be

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<sup>10</sup> Exhibit 8. Section VII.C.1, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

an effective contributor to the agency if he learns from this incident. Therefore, the superintendent concluded that mitigation should be applied. Rather than a discharge from employment, grievant received a demotion from sergeant to senior corrections officer, and a Written Notice that his behavior was unacceptable. Given the totality of the circumstances in this case, the agency's discipline was an appropriate and measured response to the offense.

### DECISION

The decision of the agency is affirmed.

The Group III Written Notice and demotion issued on December 6, 2002 are hereby UPHELD. The disciplinary action shall remain active for the period specified in Section VII.B.2 of the Standards of Conduct.

### APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>11</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>12</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.  
Hearing Officer

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<sup>11</sup> An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 2002 Va. App. Lexis 756, (December 17, 2002).

<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.